No. 15004

United States Court of Appeals

For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANT WESTERN CANADA STEAMSHIP CO., LTD.

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I.

STATEMENT OF JURISDICTION

This is an action for damages for alleged breach of a charter party. The alleged breach consists of an unreasonable delay on the part of the charterer (appellee) in redelivering the vessel to the owner (appellant).

The court below had jurisdiction of the action under the Suits in Admiralty Act, 46 USCA §741 *et seq.* It should be noted here that the libel originally alleged jurisdiction under the Public Vessels Act, 46 USCA §781 *et seq.* (Tr. 3-5). However, subsequent to the commencement of the action on February 9, 1953, the decision in *Calmar Steamship Corp v. United States,* 345 U.S. 446 (1953), made it clear that jurisdiction in such a case lies under the Suits in Admiralty Act, not the

Public Vessels Act, and the court below so found and concluded (Tr. 60, 64).

Jurisdiction of this court is based upon 28 USCA §1291. Appellant gave notice of appeal within 90 days after entry of the final decree in the court below pursuant to 28 USCA §2107 (Tr. 68), and filed its cost bond on appeal the same day (Tr. 76).

Appellee's amended answer to the libel filed by appellant denies any alleged breach of the charter party (Tr. 43-46), and for affirmative defenses alleges: (1) that appellant failed to comply with Article 29 of the charter party regarding revision of the charter rate of hire by failing to make a written demand for such revision (Tr. 46-50); (2) that any delay in Japanese ports was caused by congestion of those ports and the needs of the United States and the United Nations for particular cargos more than other cargos (Tr. 51-52); and (3) that any delay in Japanese ports was caused by restraint of princes, rulers or people (Tr. 53-54).

Following the trial, findings of fact, conclusions of law and the final decree were entered September 19, 1955 (Tr. 58-68), resulting in the dismissal of appellant's libel with prejudice and with costs to appellee (Tr. 67-68). It is from these findings, conclusions and decree that appellant appeals (Tr. 68-69).

II.

STATEMENT OF THE CASE

On July 26, 1950, appellant, a Canadian corporation, chartered its vessel, the SS LAKE SICAMOUS (hereinafter called the "Vessel"), to appellee (acting through the Military Sea Transportation Service) for "about 120 days from the time of delivery of the Vessel or to the termination of the voyage current at termination date" (Tr. 58-59; Ex. 1, Tr. 98-99). The charter contemplated two round voyages between the Pacific Coast and the Far East (Finding of Fact IV, Tr. 59-60). An option in favor of appellee for a 120-day extension was deleted from the charter party form (Tr. 98-99). The Vessel was delivered to appellee on August 4, 1950 (Tr. 182), and was not redelivered to appellant until February 12, 1951—192 days 13 hours after delivery! (Tr. 221). During this time the market rate of charter hire for the Vessel sharply advanced from the charter rate, $1125.00 per diem (Tr. 98), to $2,150.00 per diem (Tr. 173, 160).

The charter party provided, among other things, that appellee was to load and discharge the cargo at its own cost and expense (Finding of Fact II, Tr. 59). In addition, it included a mutual exception for "restraint of princes, rulers or people, . . . " (Finding of Fact II, Tr. 59, 101).

The delay complained of on this appeal consists of a delay of 11 days, 17 hours and 15 minutes in loading the Vessel at Bangor, Washington, and a delay of 29 days, 22 hours and 20 minutes lying at anchor at Kure, Japan, before the Vessel was discharged. The evidence bearing

upon these delays consists entirely of depositions, exhibits and responses to interrogatories (Depositions: Craig, Tr. 174-257; Sanderson, Tr. 296-334; Scales, Tr. 335-343; Blust, Tr. 344-355. Exhibits: Vessel log books, Ex. 16, 17, 18. Responses to Interrogatories: Tr. 290-293).

The evidence in the case is largely uncontradicted and uncontraverted. After delivery of the Vessel to appellee on August 4, 1950, she was loaded with approximately 8,500 tons of ammunition at Mukilteo, Washington, and sailed to Buckner Bay, Okinawa, for discharge, returning to Seattle on October 13, 1950, for an elapsed time of approximately 70 days on the first voyage under the charter (Tr. 182-187, 256-257).

At this point 50 days remained of the 120-day period of the charter party, and the Vessel was sent to Bangor, Washington, to load ammunition for a second voyage to Japan (Tr. 187-189, 197). At Bangor she took on approximately 9,800 tons of ammunition, consisting of 7,000 tons of 105 and 155 mm. howitzer shells, and 2800 tons of Air Force rockets (Finding of Fact VI, Tr. 60). It took almost 24 days to load the cargo at Bangor for the second voyage (Tr. 195), and during loading the Vessel was worked only one or two shifts a day after the first week, with no work on Saturdays and Sundays (Tr. 190-195).

At that time the established custom in West Coast ports was to load such vessels continuously 24 hours a day seven days a week (Tr. 189-190). Captain Craig, Master of the Vessel, and the only witness that was present at Bangor, testified without contradiction that

the Vessel was not loaded within a reasonable time at Bangor, and that with the facilities at hand there she should reasonably have been loaded in 12 days (Tr. 195-196).

Appellee introduced no evidence whatsoever to explain the delay at Bangor, and asserted no affirmative defense with respect thereto.

From Bangor the Vessel sailed for Yokohama (Tr. 197), but was diverted in mid-ocean to Moji by appellee (Tr. 200). At Moji she discharged the 2800 tons of Air Force rockets (Tr. 202-204), and from there she was sent to Kure to complete discharge (Tr. 207), arriving there on December 13, 1950 (Tr. 207). At Kure she lay at anchor 29 days, 22 hours and 20 minutes before commencing discharge (Tr. 207-208), during which period other MSTS ships, the only other ships in the harbor (Tr. 352, 354, 322), arrived and were discharged constantly (Tr. 213-214). During this period the Master was advised that the delay was due to the unavailability of storage facilities ashore for the cargo and that cargo on other ships had a higher "priority" (Tr. 211). Finally the Master was advised on January 10th that the Vessel was to be discharged as quickly as possible because her charter had expired (Tr. 212), and on January 12, 1951, discharge commenced (Tr. 208). The Vessel was then discharged with dispatch (Tr. 209-210), and returned to Seattle for redelivery to appellant on February 12, 1951 (Tr. 216-218).

The background of events was as follows: On June 24, 1950, the United States entered the Korean war via United Nations action. Early reverses forced United

Nations troops back on the Pusan perimeter in Korea. Commencing with and prior to the Inchon landing in September, United Nations troops rapidly advanced up the Korean Peninsula to the Yalu River, opening up Korean ports along the advance. Consequently, some supply vessels were sent directly to Korean ports. With the entry of the Chinese into the war in late November, United Nations forces retreated down the peninsula, closing the reopened ports. Supply vessels destined for those ports were diverted to Japanese and other ports (Tr. 299-301). In the meanwhile the United States Army had built up a tremendous reserve of artillery ammunition in Japan and had exhausted available storage facilities (Tr. 301, 307, 347-348, 351-352). Since further supplies continued to be sent over, a program of rehabilitating old Japanese ammunition depots for storage space was commenced. Certain of these facilities were located in or near Kure (Tr. 307-308, 346). The original Army survey of the Kure facilities was made around Thanksgiving (Tr. 310-311, 316, 346). By December 1st, the Kure depots were capable of receiving some ammunition (Tr. 340-341, 353). However, their rehabilitation was not complete but was still in progress (Tr. 340-341). As the rehabilitation progressed, further storage capacity was made available (Tr. 341). Because of the necessity for such rehabilitation of storage areas, the Army knew that Kure "could not be counted on as a full-fledged ammunition port" (Tr. 311).

The port of Kure was technically under British Command (Tr. 308) but by agreement the United States Army was permitted the use of the port subject only to

preference in discharge for British ships (Tr. 323). However, between December 1, 1950, and January 15, 1951, the only ships in the port were MSTS ships ordered there for discharge (Tr. 352, 354). During this period 12 MSTS ships (other than the Vessel) were in the port for discharge (Tr. 290). With one exception (the SS Olympic Pioneer) they were owned by the United States (Maritime Administration) and bareboat chartered to private companies (Tr. 290-292). Without exception they were time chartered to the MSTS for about 120 days or until termination of the voyage current at termination date, with an option in favor of the MSTS for a 120-day extension (Tr. 292-293); and with one exception (the SS Olympic Pioneer) the original 120-day period started later than the charter period of the Vessel and thus also expired later (Tr. 292-293).

At Kure the Army determined the order of discharge for arriving vessels by applying two criteria. The first, and most important, was the need for the cargo aboard, which was determined according to a "priority" list revised as often as needs changed, practically daily (Tr. 305, 336, 347, 349, 351). At the time here involved the 2800 tons of Air Force cargo was "high priority" cargo (Tr. 302, 337, 347), and the 105 and 155 mm. artillery shells were "low priority" because of the abundant reserves of such ammunition already on hand in Japan (Tr. 324, 347-348, 351). The second criteria for order of discharge, which applied only in the absence of "priority" of cargo, was the length of time of the ship in the theatre (Tr. 305), regardless of her length of time at the ultimate port of discharge (Tr. 306).

In the meanwhile on January 19, 1951, appellee, through its agent in New York, notified the contracting officer under the charter party that in view of the delay appellee intended "to claim an increase in the per diem hire figure of $1125.00 for the period in excess of 120 days due to the higher Time Charter rates paid subsequent to the expiration of the 120-day charter period, the increase to be agreed upon at a later date" (Ex. 5, 6; Tr. 119, 134). When appellant presented its claim for damages for the delay to appellee, the contracting officer rejected it for lack of authority over a claim for unliquidated damages for breach of contract (Ex. 8; Tr. 122-123). Thereafter the General Accounting Office, conceding an unreasonable delay of at least 23 days, nevertheless rejected appellant's claim, contending that the delay was caused by unanticipated "conditions and exigencies of the war" and that Article 29 of the charter party had not been complied with (Ex. 12; Tr. 130-132).

Thereafter appellant commenced this suit.

III.

SPECIFICATION OF ERRORS

Appellant specifies as error each of the errors specified in appellant's Statement of Points on Appeal (Tr. 364-372).

These specifications may be conveniently grouped under the following questions:

A. Whether the delay at Bangor was the result of the failure of appellee to load the Vessel with reasonable diligence or within a reasonable time under the circumstances.

The court below found that the redelivery of the Vessel to appellant "was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor" (Finding of Fact VI, Tr. 60-61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII, Tr. 64).

Appellant contends that these findings are clearly erroneous in that (1) there is no evidence in the record to support them, and (2) the only evidence in the record on this point requires a finding that the redelivery of the Vessel to appellant was unreasonably delayed by 11 days, 17 hours and 15 minutes by the failure of appellee to load the Vessel with reasonable diligence or within a reasonable time under the circumstances at Bangor.

B. Whether the delay at Kure was the result of the failure of appellee to provide a berth and discharging facilities for and discharge the Vessel with reasonable diligence or within a reasonable time under the circumstances.

The court below found that the Vessel was discharged at Kure "as soon as discharging facilities were available, in accordance with military priorities then in effect and the urgent needs of the armed forces engaged in hostilities in Korea" (Finding of Fact IX, Tr. 61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII; Tr. 64).

Appellant contends that these findings are clearly erroneous in that the overwhelming evidence in the rec-

ord requires a finding that the redelivery of the Vessel to appellant was unreasonably delayed by 29 days, 22 hours and 20 minutes by the failure of appellee to provide discharging facilities for and discharge the Vessel with reasonable diligence or within a reasonable time under the circumstances at Kure.

C. Whether the delays at Bangor and Kure are excused under the "restraint of princes" clause in the charter party.

The trial court found and concluded in effect that the delays at Bangor and Kure were caused by sovereign acts of the United States and the United Nations in the conduct of the Korean war and were therefore excused under the "restraint of princes" exception in the charter party (Findings of Fact XIII, XIV, XV, XVI, Tr. 62-64; Conclusion of Law III, Tr. 65).

Appellant contends that these findings and conclusions are clearly erroneous in that (1) there is no evidence in the record to support them with reference to the delay at Bangor; and (2) the overwhelming evidence in the record regarding the delay at Kure requires a finding (a) that the delay at Kure was caused by the lack of storage facilities ashore and the congestion of the port created by appellee itself, and (b) that the Korean war was neither the sole nor the direct proximate cause of the delay; and (c) that the "priority of cargo" discharge system was not a sovereign measure but was merely the basis upon which appellee as a charterer or consignee determined the order in which it would discharge its supplies from waiting vessels.

D. Whether Article 29 of the charter party (Revi-

sion of Rate of Hire) is applicable to appellant's claim for damages for delay, and, if so, whether compliance therewith was waived, and, in any event, whether appellant substantially complied therewith in fact.

The court below found that appellant "failed to perform the terms and conditions of Article 29 of the charter party by failing to make any demand for negotiations for a revision of the rate of charter hire under the terms and conditions of Article 29" (Finding of Fact XVIII, Tr. 64).

Appellant contends that this finding is clearly erroneous in that (1) Article 29 is not applicable to a claim for damages for delay (*i.e.,* breach of contract), (2) if Article 29 is applicable, any lack of compliance therewith was waived by appellee, and (3) in any event the only evidence in the record on this point is that appellant made a sufficient demand under Article 29 on January 19, 1951.

D. What amount of damages should be decreed in favor of appellant?

Since all of the evidence necessary to compute appellant's damages is before this court, the decree below should be reversed and a decree awarding damages to appellant, with interest and costs, entered by this court.

In addition such of the other conclusions of the court below as are inconsistent with appellant's contentions stated above, together with the final decree, are erroneous for the reasons stated above (Conclusions of Law II, IV, V, VI, Tr. 65-66; Final Decree, Tr. 67-68).

IV.

SUMMARY OF ARGUMENT

A. This Court May Set Aside a Finding of the Court Below That Is Clearly Erroneous.

B. The Delay at Bangor Was Caused by the Failure of Appellee to Load the Vessel Within a Reasonable Time or With Reasonable Diligence Under the Circumstances.

Appellee knew or should have known that the second voyage under the charter party would be an "overlap" voyage, since the first voyage consumed more than half the 120-day charter term. Appellee was thus under a duty to load, forward, provide discharging facilities for and discharge the Vessel with reasonable diligence on the second voyage. This is an essential part of the doctrine permitting the charterer a reasonable overlap under a charter for "about" a specified term. Appellant concedes that the second voyage was a reasonable overlap voyage when designated, and seeks only to recover its damages for the wrongful delay that occurred in the course of the voyage. Under such circumstances the charter party became essentially a voyage charter with respect to the overlap voyage.

Where, as here, the charterer agrees to load the ship, and no time for loading is specified in the charter party, the charterer is bound to load the ship within a reasonable time and with reasonable diligence under the circumstances. At Bangor appellee took 23 days, 17 hours and 15 minutes to load the Vessel. Of that time the Vessel was actually worked by the stevedores only 9 days, 19 hours and 30 minutes; therefore she could have been

loaded in that time had the loading proceeded continuously as was the custom in West Coast ports. The uncontradicted testimony of the Vessel's Master, and the *only* testimony on this point, is that the Vessel was not loaded within a reasonable time and that she should reasonably have been loaded in 12 days with the facilities at hand.

The proof that the Vessel was not loaded in accordance with the custom in West Coast ports placed the burden on appellee to prove circumstances that would excuse the delay and its reasonable diligence under those circumstances. This appellee wholly failed to do.

C. The Delay at Kure Was Caused by the Failure of Appellee to Provide Discharging Facilities for and Discharge the Vessel Within a Reasonable Time or With Reasonable Diligence Under the Circumstances.

No time for discharge being specified in the charter party, appellee was bound to provide a berth and discharging facilities for and discharge the Vessel within a reasonable time under the circumstances at Kure. However, in determining what a reasonable time is, congestion caused by appellee having ordered too many ships into the port may not be taken into account. Nor was appellee entitled to use the Vessel for storage to supplement its onshore storage capacity.

The congestion at Kure was created entirely by ships operated by or for appellee under time charter to the MSTS. Therefore the congestion may not be taken into account in determining whether appellee provided discharging facilities for and discharged the Vessel within a reasonable time. Excluding the congestion from con-

sideration, the delay of almost 30 days at anchor before the Vessel was discharged at Kure is *ipso facto* unreasonable.

In addition, the delay was compounded by the lack of sufficient ammunition storage facilities ashore at Kure. Kure had barely been opened as an ammunition port when the Vessel arrived there, and nearby Japanese ammunition depots were just starting to be rehabilitated for use in early December. The Army, which acted as consignee or agent for the MSTS with respect to discharging ships at Kure, knew that Kure could not be counted on as a full-fledged ammunition port, and nevertheless appellee ordered more ships there for discharge than the discharge facilities could handle or storage facilities accommodate.

D. Neither the Delay at Bangor Nor the Delay at Kure Was Excused Under the "Restraint of Princes" Exception in the Charter Party.

Since appellee asserted the defense of "restraint of princes" under the charter party, appellee had the burden of proving that defense. Furthermore, appellee had to prove that the alleged restraint was the *sole proximate cause* of the delay.

Appellee did not plead "restraint of princes" as a defense to the delay at Bangor, nor did it offer any evidence in support of such a defense. There is no evidence whatsoever in the record tending to show what the reason for the delay at Bangor was, or that it was caused by a sovereign act of any nature whatsoever.

With respect to the delay at Kure, whatever its rea-

son for ordering too many ships into Kure for discharge, the fact remains that appellee acted voluntarily in that regard. Were there no congestion, there would have been no need for a "priority" system to determine order of discharge. It is clear then, that whatever the character of the "priority of cargo" system actually adopted, *i.e.,* whether or not it was the expression of sovereign will, it was not the proximate cause, and certainly not the *sole* proximate cause, of the delay.

However, in fact the "priority of cargo" discharge system was neither a "restraint" nor a restraint "of princes." It was merely a flexible, changing list of various types of ammunition, ranked in order of the logistic needs from time to time of the various United States forces, based upon which the Army selected ships for discharge according to the cargo aboard, and applied only to ships under charter to appellee.

In any event, appellee could have avoided the delay by the exercise of reasonable diligence. Had the MSTS made a proper request for immediate discharge of the Vessel upon her arrival, her charter term having expired, the Army undoubtedly would have granted the same, as such requests were not uncommon.

E. This Action Is Not Barred by Article 29 of the Charter Party Regarding Revision of the Rate of Hire.

Article 29 should be construed to be limited to a charter hire adjustment during the rightful charter period, and not a claim for damages for breach of contract by unreasonable delay.

In addition, appellant in fact actually made a sufficient demand for negotiations under Article 29. On Jan-

uary 19, 1951, appellant's agent in New York, acting pursuant to instructions from appellant, advised the contracting officer by letter that appellant intended "to claim an increase in the per diem hire figure of $1,125.00 for the period in excess of 120 days due to the higher Time Charter rates paid subsequent to the expiration of the 120-day charter period, the increase to be agreed upon at a later date."

In any event, Article 29 is merely a limited form of arbitration clause, the benefits of which were waived by appellee's complete denial of liability under the contract.

F. Appellant's Damages Should Be Fixed at $27,766.35 and a Decree Entered Accordingly.

In an admiralty appeal this court may dispose of the case by entering its own decree awarding damages. The measure of damages is the difference between the market and charter rates of hire for the period by which the overlap was extended by the wrongful delay.

Here the Vessel should have been redelivered on January 2, 1951, a total of 41 days, 15 hours and 35 minutes prior to actual redelivery. By early January the market rate had advanced to $1,791.67 per diem—$666.67 per diem more than the charter rate. Therefore appellant's total damages amount to $27,766.35.

In addition, under the Suits in Admiralty Act appellant is entitled to interest on that amount from the time this suit was commenced, at the rate of 4% per annum, together with its costs in the court below hereinafter to be taxed.

V.

ARGUMENT

A. This Court May Set Aside a Finding of the Court Below That Is Clearly Erroneous.

In an admiralty case the Court of Appeals may set aside a finding of the District Court that is clearly erroneous. *McAllister v. United States,* 348 U.S. 19 (1954). A finding is clearly erroneous (1) when, although there is evidence in the record to support it, the Court of Appeals *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed, *McAllister v. United States, supra;* and of course, (2) when there is no evidence in the record to support it; and (3) when it is erroneous as a matter of law.

Since substantially all of the evidence bearing upon the points involved in this appeal is in the form of depositions, exhibits and answers to interrogatories, this court is in as good a position as was the court below to weigh the probative value of all the evidence, and there is no reason for this court to be loath to follow its own definite and firm convictions in the interests of substantial justice. *Cf., The Ernest H. Meyer,* 84 F.(2d) 496, 501 (C.A. 9 1936). If upon balance of the probabilities an inference made by the court below from the facts proved does not seem reasonable, this Court may find a decree based upon such evidence clearly erroneous. *Cf., McAllister v. United States,* 348 U.S. 19, 22 (1954).

B. Knowing There Was Bound to Be an Overlap, Appellee Was Bound Under the Charter Party to Use Reasonable Diligence to Load, Forward, Provide Discharging Facilities For and Discharge the Vessel on the Second Voyage.

The charter contemplated two round voyages from port or ports on the Pacific Coast to port or ports in the Orient (Finding of Fact IV, Tr. 59-60). The first voyage was from Mukilteo, Washington, to Buckner Bay, Okinawa, and return, with a cargo of ammunition, and consumed a total of 70 days, 10 hours and 36 minutes from the time of delivery (Tr. 182-187). Over one-half of the original 120-day charter period had elapsed. Appellee then determined to load the vessel with a full cargo of ammunition at Bangor, Washington, send her to Yokohama, Japan, for discharge, and return her to Seattle, Washington. As Captain Clarke, an experienced steamship operator, testified, the reasonable time to be anticipated for such a voyage was not less than 66 days (Tr. 277). Thus, it was apparent, or should have been apparent, to appellee that the second voyage under the charter party would be an overlap voyage. Under such circumstances the charter became essentially a voyage charter with respect to the second voyage, and appellee was under a duty to load, forward and discharge the vessel with reasonable diligence. *Cf., Hector SS Co. v. V. O. Sovfracht, Moscow,* (1945) 1 K.B. 343. Appellant concedes that the second voyage was a reasonable overlap voyage under the circumstances when

originally designated, and seeks only to recover for the *wrongful delay* that ensued in the course of the voyage. It is clear that a delay in redelivery due to the exercise by the charterer of a right to overlap under an "about" charter is permissible only to the extent that it is not caused by the fault, negligence or lack of diligence of the charterer. This is an essential part of the "overlap" doctrine. As stated by Judge Brown in *Straits of Dover SS Co. v. Munson,* 95 Fed. 690, 692 (DCNY 1899):

> "The reasonable inference as to the intention, to be drawn from these circumstances is, that the charterer should be authorized to make use of the vessel, at the rate agreed upon, for at least one complete voyage, taking any customary return cargo at the customary ports; and that any prolongation of the charter period in accomplishing the voyage and in taking a return cargo, *not caused through any negligence or lack of diligence of the charterer, or his agent,* must be deemed governed by Paragraphs 4 and 5 and not subject to any increased rates." (Italics added)

In *The Rygja,* 161 Fed. 106, 107 (C.A. 2 1908), the court referred to the foregoing case as follows:

> "Judge Brown in a case of overlap construed such a provision to entitle the charterer to at least one round voyage of the character contemplated in the charter at the charter rate of freight, *unless the delay was due to his own fault.*" (Italics added)

Thus the law is well settled that appellee will be liable in damages for any delay in the second voyage occasioned by appellee's fault.

C. The Redelivery of the Vessel Was Unreasonably Delayed 11 Days, 17 Hours and 15 Minutes by Reason of Appellee's Failure to Load the Vessel With Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Bangor.

The only evidence in the record pertinent to the delay at Bangor is that the Vessel was not loaded within a reasonable time at Bangor, and that she was not loaded continuously 24 hours a day seven days a week as was the established custom in West Coast ports. Appellee neither pleaded any affirmative defense nor offered any evidence regarding this delay. Nevertheless the court below found that the redelivery of the Vessel to appellant "was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor" (Finding of Fact VI, Tr. 60-61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII, Tr. 64).

These findings are clearly erroneous in view of the uncontradicted and unimpeached evidence to the contrary.

1. *Appellee was bound under the charter party to load the Vessel within a reasonable time under the circumstances at Bangor.*

Where, as here, the charterer agrees to load and discharge the ship, and no time for loading or for discharge is specified in the charter party, the charterer impliedly agrees to load and discharge the ship in such time as is reasonable, in view of all the existing facts and circumstances, ordinary and extraordinary, legitimately bear-

ing upon that question at the time of her loading and discharge. *Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co.,* 77 Fed. 919 (C.A. 8 1896); *Donnel v. Amoskeag Mfg. Co.,* 118 Fed. 10 (C.A. 1 1902); *Hick v. Raymond,* (1893) A.C. 22 (House of Lords); see, Poor on Charter Parties 122 (4th Ed., 1954). The charterer must use reasonable diligence under the circumstances to provide a berth and have the vessel loaded or discharged. *The James H. Hoyt,* 1924 AMC 1108 (DC Mich.); *Hick v. Raymond,* (1893) A.C. 22 (House of Lords); *Ford v. Cotesworth,* L.R. 4 Q.B. 127, 5 Q.B. 544; *Taylor v. Great Northern Rwy. Co.,* L.R. 1 C.P. 385; *Ashcroft v. Crow Orchard Colliery Co.,* (1874) L.R. 9 Q.B. 540.

Proof that the ship was delayed in loading beyond that time required to load in the customary manner throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the loading and his reasonable diligence thereunder *Cf., Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.,* 77 Fed. 919 (C.A. 8 1896) (". . . when a ship is to be unloaded, under ordinary circumstances, the customary method and the customary time in its port of delivery prove the reasonable method and the reasonable time, and measure the liability for detention, in the absence of countervailing evidence." *Id.* at 923).

2. *The evidence shows that Vessel was not loaded within a reasonable time and with reasonable diligence at Bangor.*

The Vessel arrived at Bangor and commenced loading at 1815 hours on Tuesday, October 17, 1950 (Tr.

188-189). Loading was not completed until 1130 on November 10, 1950 (Tr. 194), for an elapsed loading time of 23 days, 17 hours and 15 minutes. During that period no cargo was worked a total of 13 days, 21 hours and 45 minutes (Tr. 195), meaning that the Vessel was worked only 9 days, 19 hours and 30 minutes (including time out for meals). The Vessel was in fact, then, completely loaded in 9 days, 19 hours and 30 minutes, which fact alone establishes the reasonable loading time and indicates that the unreasonable delay was a total of 13 days, 21 hours and 45 minutes.

However Captain Craig, the Master of the Vessel and the only witness who was present at Bangor and observed the facilities available for loading, testified that the Vessel was not loaded within a reasonable time, and that "12 days would be a reasonable time for loading that cargo" (Tr. 195-196). Therefore appellant claims the difference between 12 days and the actual loading time, or 11 days, 17 hours and 15 minutes.

3. *The evidence shows that the Vessel was not loaded in the customary manner at Bangor, and appellee failed to offer evidence of circumstances excusing the delay.*

The established custom in West Coast ports was to load such ships continuously 24 hours a day 7 days a week (Tr. 189-190). In sharp contrast, the Vessel was loaded 24 hours a day for only the first three days. Then she was left idle for the full week end; then worked only one or two shifts a day for the ensuing five week days and left idle for another full week end; then worked only *one* shift a day for the ensuing five week days and

left idle for a third full week end; then worked only *one* shift a day for four and a half days until loading was completed (Tr. 190-194). At one time only one longshore gang worked the ship (Tr. 192), and another time all gangs stopped "awaiting cars" (Tr. 193).

That appellee recognized the custom of continuous loading is demonstrated by the fact that the Vessel was loaded continuously (excepting only a portion of one Sunday) at Mukilteo (Tr. 183-184), and discharged continuously at Buckner Bay (Tr. 185-186) and Kure (Tr. 209-210).

This proof placed the burden on appellee to show circumstances excusing the delay and its reasonable diligence thereunder. *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.,* 77 Fed. 919 (C.A. 8 1896). This appellee wholly failed to do, notwithstanding the fact that Bangor is only a few miles from Seattle and presumably witnesses and records were available. The obvious reason for this omission is that there were no excusatory circumstances. Certainly Korean reverses did not affect the loading at Bangor, since the Chinese did not enter the Korean war until late November after loading was completed (Tr. 299-300, 333). There is some discussion by Colonel Sanderson about the problem of "mass detonation" in handling explosives, *i.e.,* that only a given amount of explosives may be safely concentrated in a given area in a given time, which factor could slow down loading. However, that discussion was limited to the situation in Japan. Colonel Sanderson was not in Bangor at the time (Tr. 297), and there is no evidence whatsoever that there was a problem of mass detonation

at Bangor, nor that the general problem of mass detonation in any way contributed to the delay at Bangor.

Counsel for appellee (but not any witness) suggested that stevedores may not have been available, or that the cargo may not have been ready (Tr. 243-244). However, the unavailability of stevedores will not excuse the charterer from delay. As stated by Judge Hunt in *W. R. Grace & Co. v. Hansen,* 273 Fed. 486, 492 (C.A. 9 1921):

> "The argument that the stevedores were at fault in loading with only one gang, and that the progress in loading was not satisfactory, does not help the charterers, inasmuch as it was their duty to have provided additional stevedores, or otherwise to have made provision for the expedition of the work of loading."

And it is a basic principle of charter party law that the charterer is bound to have his cargo ready for loading.

> "In general, however, there is an absolute obligation on the part of the charterer to have the cargo ready at the port of lading, and a delay in bringing it there is not one of the circumstances to be considered in determining whether the charterer has loaded the vessel within a reasonable time." MacLachlan, Law of Merchant Shipping, 416 (6th ed., 1923).

4. *Appellee did not even plead a defense to the delay at Bangor.*

Finally on this point, it is significant that appellee did not even plead any defense to the delay at Bangor. Appellee's affirmative defenses relate only to the delay at Kure (Tr. 51-54), and the alleged failure of appellant

to demand a revision of the charter rate of hire under Article 29 of the charter party (Tr. 46-50).

Since the uncontradicted and unimpeached evidence in the case, and the only evidence on this point, conclusively establishes that the redelivery of the Vessel to appellant was delayed by at least 11 days, 17 hours and 15 minutes by appellee's failure to load the Vessel with reasonable diligence or within a reasonable time under the circumstances at Bangor, the findings of the court below to the contrary are clearly erroneous.

D. The Redelivery of the Vessel to Appellant Was Unreasonably Delayed 29 Days, 22 Hours and 20 Minutes by Reason of Appellee's Failure to Provide a Berth and Discharging Facilities For and Discharge the Vessel With Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Kure.

The overwhelming weight of evidence in the record is that the port of Kure was congested with other MSTS ships voluntarily ordered there for discharge by appellee, and that the Vessel could have been discharged immediately upon arrival but for that congestion and a shortage of storage facilities ashore. Nevertheless the court below found that the Vessel was discharged "as soon as discharging facilities were available, in accordance with military priorities then in effect and the urgent needs of the armed forces engaged in hostilities in Korea" (Finding of Fact IX, Tr. 61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII, Tr. 64).

These findings are clearly erroneous in view of the overwhelming weight of the evidence to the contrary.

1. ***In determining what a reasonable time is, congestion caused by the charterer ordering too many ships into the port may not be taken into account.***

The charterer must use reasonable diligence under the circumstances to provide a berth or other facilities for discharge and discharge the ship within a reasonable time. This principle was early established in *Postlethwaite v. Freeland,* 5 App. Cas. 599, 608. Then, in *Wright v. New Zealand Shipping Company,* (1878) 4 Ex. D. 165, 40 L.T. 413, the rule was announced that in determining what a reasonable time is, congestion caused by the charterer ordering too many ships into the port will not be taken into account. Lord Judge Cotton stated the rule as follows:

> "In my opinion, for the purpose of determining what was a reasonable time on the contract between the plaintiff and the defendant, the defendant is not entitled to excuse delay that would otherwise be inexcusable by saying, 'I sent so many ships to that port that the lighters that I engaged did not enable me to unload your ship within what would otherwise (and if I had not taken those other ships to that port) have been a reasonable time.' In my opinion he cannot excuse his delay by claiming an allowance for the time during which he used his lighters, which could have been used for that ship, for the purpose of unloading other ships sent by him to the port."

And in *Hick v. Raymond,* (1893) A.C. 22 (House of Lords), the House of Lords conclusively settled the point by holding that the charterer must discharge the vessel within a reasonable time under the actual circumstances obtaining, except that circumstances caused

or contributed to by the charterer or consignee cannot be taken into account.

The American rule is the same. In *W. K. Niver Coal Co. v. Cheronea SS Co.,* 142 Fed. 402, 411 (C.A. 1 1905), the court stated as follows:

> "However, even if there had been an insufficiency of wharves or of barges or lighters, that was not a matter beyond control, but a condition to which the consignee had contributed. It had four large coal steamers involved in these appeals, voluntarily bunched together in the port at Boston; and the case of the steamship LAKE MICHIGAN, disposed of at our last term, shows another even larger steamer for which it was responsible, in port at the same time. * * * Thus, while the Roath was delayed, more than her entire cargo was discharged into lighters from other steamers chartered or controlled by the W. K. Niver Coal Company. Its own vessels, or vessels under its control, were given facilities which, if concentrated on the Roath, would have discharged her seasonably.
>
> "The same course of reasoning is to be applied to all the steamers involved in the appeals before us. Each of them had her own rights as against the W. K. Niver Coal Company. They were not under a joint contract, but each was under a separate contract; so that each was entitled to assert her rights independently of the others, although the consignee had so involved itself by its several charters, or by charters on its account, that it was unable to do its duty by any one of them. *A condition of affairs brought about by a contractor on the one part does not relieve him from his obligation to each of the contracting parties on the other part, acting severally, because the condition resulted in embarrassing*

all of them at the same time. To consent to any other rule would permit a contractor to relieve himself of his contracts in proportion to the number of parties he might involve in his own embarrassment by virture of his own separate voluntary acts." (Italics added)

2. ***A charterer may not delay his chartered vessels by using them to supplement his onshore storage capacity.***

The charterer may not use the chartered vessels as a storage warehouse to supplement his own onshore storage capacity. At least, he may not do so at the charter rates if the market rate of charter hire advances during the meanwhile. In this regard *Leonard v. William G. Barker Co.,* 214 Fed. 325 (DC Mass. 1914), is pertinent. The court there said:

> "It is contended by the libelant that the custom of awaiting turns will not, as against a vessel awaiting her turn, excuse the charterer from liability for delay caused by his failure to discharge preceding vessels with due diligence; and it is clear that, if this were not so, the custom might lend itself to a great hardship upon lumber vessels, for a lumber laden schooner might be kept a long time awaiting a berth, *while the consignee held vessels ahead of her for the mere purpose of storehouses.* The custom of awaiting turn cannot be invoked for the mere convenience of the charterer or consignee in the conduct of his business." (Italics added)

In this connection it should also be noted that when the charterer consigns the ship to another for discharge, he becomes liable for the acts or omissions of the consignee, *Donnell v. Amoskeag Mfg. Co.,* 118 Fed. 10 (C.A. 1, 1902); Poor on Charter Parties 122 (4th ed.,

1954); and likewise for those of his agent for discharge. *Lind v. United States,* 44 Ct. Clms. 558 (1909). Therefore, if appellee's acts as a charterer are deemed limited to those of the MSTS, appellee is nevertheless bound by the Army's acts as consignee or agent for discharge.

3. *The delay at Kure was directly caused by the congestion voluntarily created by appellee and contributed to by the lack of storage capacity ashore.*

The congestion of the port was voluntarily created by appellee. The Army officers in charge at Kure testified that all of the ships in Kure during the months of December, 1950, and January, 1951, were MSTS ships (Tr. 352, 354). Therefore the congestion was created by appellee having ordered too many ships into Kure during this period. Although the *reason* appellee did so might have been that reverses in the course of the war closed Korean ports, the *cause* of the congestion was appellee's own decision to order the number of ships into Kure that were actually ordered there. Appellee could have ordered the ships into any Japanese port, or back to the United States, or to Okinawa, but instead voluntarily chose to order these ships into Kure, thus burdening the discharge facilities of that port beyond their capacity. In addition, there is no evidence that any ship in Kure at that time except the Vessel was originally destined for a different port, Korean or Japanese. Insofar as congestion is concerned, this case falls squarely within the doctrine of *Wright v. New Zealand Shipping Company,* (1878) 4 Ex. D. 165, 40 L.T. 413, *supra,* and *W. K. Niver Coal Company v. Cheronea SS Co.,* 142 Fed. 402 (CA 1 1905), *supra.* The case is to be deter-

mined as if no other MSTS ships were in the harbor at Kure, and under such circumstances it is obvious that the Vessel could have been discharged immediately if there were adequate storage facilities ashore. If there were inadequate storage facilities ashore, that is, of course, a condition for which appellee is liable under *Leonard v. William G. Barker Co.,* 214 Fed. 325 (DC Mass. 1914), *supra.*

It should be noted that the lack of storage capacity for the 105 and 155 mm. howitzer ammunition and the congestion were conditions that antedated the reverses in the Korean war (Tr. 301, 346). The Chinese entered the war in late November, 1950 (Tr. 299-300, 333). Prior to that time the lack of storage facilities for such ammunition in Japan had become acute (Tr. 307), as is evidenced by the action of the Army in surveying the storage facilities in and about Kure for use before Thanksgiving of 1950 (Tr. 310-311, 316, 346, 353). And, as stated by Lieutenant Colonel Blust, the officer actually in command at Kure (Tr. 347-348):

> "There were many, many ships having nothing but 155's and there was a lot in storage."

He further testified as follows (Tr. 351-252):

> "Q. But do you remember quite clearly that during the period December, 1950, there were lots of 105 and 155 artillery ammunition around?
>
> A. Well, that is my recollection, yes, sir. *We were always heavy on that. That seemed to be the biggest thing coming over."* (Italics added)

Major Scales testified as follows with regard to the available storage facilities (Tr. 340-341):

> "Q. Do you know if the Japanese ammunition

dumps at Eta Jima and Kure were rehabilitated and ready for ammunition storage on December 1st?

A. On December 1st?

Q. Yes, by December 1st.

A. By what standards do you mean? Do you mean by the standards we would normally accept within the Ordinance Corps for the movement of ammunition and the acceptance of ammunition, or by what?

Q. Were they ready to take and did they commence storing ammunition in them?

A. They took *some* ammunition. They received ammunition, yes, sir.

Q. Were they still in the process of doing further rehabilitation?

A. They were rehabilitating ammunition depots within Japan until 1953, sir, yes.

Q. I want to be a little more specific particularly with respect to the facilities right there in and around Kure. Do you know whether they were still in the process of rehabilitating those Japanese depots in December, 1950?

A. *I would say yes, sir, such things as rail lines, revetments and things like that had been demolished under the occupation policy.*" (Italics added)

Colonel Sanderson testified as follows (Tr. 310-311):

"The port command had no responsibility. I had the operational responsibility, the operation of the port itself through what we call a subport headquarters. Lieutenant Colonel Blust was the officer I recommended to make the original survey of the port of Kure, and I believe this was shortly before Thanksgiving or around Thanksgiving, to look

into the port of Kure as an ammunition handling port.

"Colonel Blust went down there and came back with a report. He proceeded to headquarters in Yokohama and made his report there with ordinance, of course, and the recommendation with the British forces there how much could be handled. *Nothing had been done prior to Colonel Blust's trip with the rehabilitation of the Japanese ammunition depots.* If the depots had been opened up and had all their equipment in operable condition, discharge naturally could have been expedited, because you could handle more, but because they had not been, *the port of Kure for some time could not be counted upon as a full fledged ammunition port due to the hinterland facilities not having been rehabilitated in five years, since 1945 or prior thereto.*" (Italics added)

Captain Craig, the Master of the Vessel, was advised at the time that lack of storage facilities was one reason for the delay at Kure. He testified as follows (Tr. 211):

"Q. Now, did Captain Robertson advise you why you were not discharged for the period that you lay in the harbor?

A. Well, he told me that there were other ships that they wanted the cargo from right away.

Q. Did you receive any further advice from anyone in the Harbor Master's office as to why you were not discharged?

A. Well, there was an assistant there, a master sergeant, I believe he was, and I had a talk with him one day in the office there, and he—*he did tell me that they were making a new ammunition dump and that we wouldn't be discharged until*

that was ready to receive the ammunition." (Italics added)

(Captain Robertson was the actual subport commander stationed at Kure—Tr. 351.)

The evidence is quite clear that at some time prior to the entrance of the Chinese into the war, a serious shortage of ammunition storage space occurred in Japan. It is further quite clear that a great over-supply of 105 and 155 mm. howitzer ammunition was already stored in Japan by November. Notwithstanding this oversupply and lack of storage facilities, the Vessel was loaded with approximately 7,000 tons of 105 and 155 mm. howitzer ammunition, which loading was not completed until November 10, and was sent to Japan for discharge. By the time she arrived, there was not only a shortage of storage facilities, but in addition appellee had created a serious condition of congestion in the port of Kure by ordering too many ships into that port for discharge. It is also clear that had there been adequate storage facilities ashore at Kure, and had the congestion not existed, the Vessel would have been discharged at Kure immediately upon her arrival.

Certainly a 30-day delay before discharge is *ipso facto* unreasonable and requires appellee to come forward with a detailed explanation. Yet each of appellee's witnesses denied any knowledge of the Vessel or her delay in Kure (Sanderson, Tr. 333; Scales, Tr. 336, 339, 342-343; Blust, Tr. 350, 354). As a matter of fact, during this delay Colonel Sanderson was in Kure only once (Tr. 314), and Major Scales not at all (Tr. 340). Only Lt. Col. Blust was there frequently (Tr. 354).

There is no evidence that the Vessel was discharged in her turn even under the "priority of cargo" discharge system in effect.

However, the evidence overwhelmingly establishes that there would have been no delay if the port had not been congested with other MSTS ships and had adequate storage facilities been available. Therefore, since the redelivery of the Vessel to appellant was delayed 29 days, 22 hours and 20 minutes by appellee's failure to provide a berth and discharging facilities for the Vessel with reasonable diligence or within a reasonable time under the circumstances at Kure, the findings of the court below to the contrary are clearly erroneous.

E. Neither the Delay at Bangor Nor the Delay at Kure Was Excused Under the "Restraint of Princes" Exception in the Charter Party.

The court below both found and concluded that the delays at Kure and Bangor were excused under the "restraint of princes" exception in the charter party (Findings of Fact XIII, XIV, XV, XVI, Tr. 62-64; Conclusion of Law III, Tr. 65).

1. *There is no evidence as to the cause of the delay at Bangor; therefore it cannot be said to have been caused by a "restraint of princes."*

As shown above, the delay at Bangor occurred prior to the entry of the Chinese into the Korean war and the consequent reverses of United States forces, and there is no evidence tending to show the cause of the delay at Bangor. Therefore the findings and conclusion referred to above are clearly erroneous insofar as they

apply to the delay at Bangor. Appellee totally failed in its proof on this issue.

2. *The proximate cause of the delay at Kure was the congestion created by appellee.*

The so-called "priority of cargo" discharge system contained two criteria. The first was priority of *cargo.* The Army reviewed its needs from day to day and issued instructions as to which types of ammunition and other cargo were most needed, and ships containing such cargo were unloaded out of turn regardless of other ships waiting in the harbor. Only when all ships having such cargo were unloaded did a criterion based upon priority of the ship itself come into play. Even then, the time of the ship in the *port* was not controlling; the controlling factor was the time the ship had been in the entire *theater of war.* It is apparent, however, that this latter factor was really not important. As stated by Lt. Col. Blust (Tr. 349):

> "It wasn't really the ship, it was the *cargo* which had priority." (Italics added)

He further testified (Tr. 351):

> "Q. You said priorities changed daily. I take it you meant depending upon the demands?
>
> A. That's the only assumption you could make, demands from the field forces through headquarters.
>
> Q. Artillery shells might be high and next week's rockets could be high, or even next day rockets might be high?
>
> A. We didn't know what it would be on that low level. If they told us to unload rockets, we would unload rockets.

> Q. And that was a shifting system, there was nothing flexible (*sic*) about it? (Should be "inflexible.")
>
> A. If we had rockets to unload and we were unloading 105's on another ship, we would kick them out. We have unloaded overstowed cargo and put it back on a ship."

It is apparent that, had there been no congestion, no "priority of cargo" discharge system would have been needed, and the Vessel would have been discharged immediately upon her arrival. This being so, it is likewise apparent that the proximate cause of the delay at Kure was the congestion of MSTS ships created by appellee, not the discharge system used to determine which ship would first be unloaded. Since it is the charterer that here asserts the exceptions clause as a defense, it has the burden of proving that the delay was within the scope of the exception. *The Aquarius,* 44 F. (2d) 805 (DCMd. 1930). Furthermore, the charterer must prove that the excepted condition was the *sole cause* of the delay. As stated in *W. R. Grace & Co. v. Hansen,* 273 Fed. 486, 494 (C.A. 9 1920):

> "The question then arises: Were the charterers prevented from furnishing the cargo as called for by the charter party *solely* by reason of causes beyond their control and within the exceptive causes of the charter party?" (Italics added)

And in *Hellenic Transport SS Co. v. Archibald McNeil and Sons Co., Inc.,* 273 Fed. 290, 296 (DC Md. 1921), the court said, in dealing with the "restraint of princes" exception in a charter party:

> "In order that the contingencies specified in them shall constitute a good defense, performance

must have been thereby rendered in a practical sense impossible, illegal or dangerous (Citations omitted). It is not sufficient that the happening of one of them adds materially to the difficulties and embarrassment of the parties relying on it, if nevertheless it is still possible to perform. (Citations omitted)

"It is true that the restraint may not have been directed against the ship or the goods. It may have had other objects as, for example, the prevention of ingress or egress to or from a besieged or blockaded place, and in that sense may have been indirect. (Citations omitted) *It must, however, have been the proximate, as distinguished from the remote cause.* (Citations omitted) *If by itself it could not have prevented performance, it will not excuse merely because, in combination with non-excepted clauses, it did so.* (Citations omitted)

" * * *

"It is no light matter to weaken the binding force of mercantile contract, and the burden is heavily on him who asks that it be done. After the charterer, and others, who wished to ship coal abroad, had hired more ships than could be loaded with reasonable promptness, somebody was bound to lose heavily. (Citations omitted) Such miscalculations are always costly. They are less likely to be repeated if those who make them find themselves unable to shift the burden to other shoulders." (Italics added)

It seems apparent that, had there been no congestion, and had onshore storage facilities been adequate, the so-called "restraint of princes" would not in any way have interfered with the immediate discharge of the ship upon arrival at Kure. Therefore, it cannot be said

that the alleged "restraint of princes" was the sole proximate cause of the delay, but rather it is apparent that the real cause of the delay was the combination of congestion in the port and lack of storage facilities ashore.

3. *The "priority of cargo" discharge system was not a "restraint" as that term is used.*

As a factual matter, no actual restraint was ever imposed on the discharge of the Vessel. Rather, it was merely the fact that the Army selected cargo aboard other ships as being more desirable for immediate discharge that resulted in the discharge of those other ships before the Vessel.

There is no evidence whatsoever that the Army authorities refused any request of the MSTS for the immediate discharge of the Vessel, or that the MSTS even made such a request. However, the testimony of Colonel Sanderson clearly indicates that the Vessel would have been discharged by the Army, regardless of the so-called "priority" of her cargo, had the MSTS advised the Army that the charter period had expired. In this regard Colonel Sanderson testified as follows (Tr. 328):

> "Q. So, as a general proposition port authorities who controlled the discharge of the vessels had no information whatsoever as to whether or not charters had expired or were about to expire or what terms vessels were chartered for?
>
> A. There were two ways we found out or we would be informed, and that would be through the MSTS representative who would be in Yokohama, who would advise the transportation section of the

> Japanese Logistical Command of certain conditions or whether the master of the vessel, when he made his port of call, advised the port authorities, who were responsible for his discharge, that his charter was to run out a certain date and he wanted his ship discharged, etc. That would be the only two ways we would know about charters running out."

Inasmuch as appellee had the burden of proving a restraint, it seems that the obvious lack of evidence of any restraint of any sort refutes the contention that the delay was attributable to a restraint. Proof of the so-called "priority of cargo" discharge system is not the equivalent of proof of a restraint, especially since Colonel Sanderson's testimony indicates that the Vessel would have been discharged promptly despite the "priority of cargo" discharge system had a proper request therefor been made by the MSTS.

4. *The "priority of cargo" discharge system was not a restraint "of princes" as that term is used, i.e., it was not a sovereign act.*

It is true that the United States is not liable as a contractor for delay caused by its sovereign acts. This was early established in *Deming v. United States,* 1 Ct. Clms., 190 (1865), and *Jones v. United States,* 1 Ct. Clms. 385 (1865). The rule was concisely stated in *Jones v. United States, supra,* as follows:

> "Whatever acts the Government may do, be they legislative or executive, *so long as they be public and general,* cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with individuals." (Italics added)

The question, then, is whether appellee (or its consignee or agent), in establishing the so-called "priority of cargo" discharge system, was acting as a sovereign or as a contractor. Was the priority of discharge system a "public and general" system?

There is absolutely no evidence in the record tending to show that the so-called "priority of cargo" discharge system was applicable to any ships other than those operated by or for the MSTS. There is no evidence tending to show that commercial ships arriving at Japan during the period involved were affected by the so-called "priority of cargo" discharge system. In fact, it is clear from the testimony of appellee's own witnesses that non-MSTS ships were *not* bound thereby. Colonel Sanderson testified that had a British ship come into the port during that period, it would have been given priority of discharge over MSTS ships (Tr. 323).

Appellee's own witnesses further testified that the so-called "priority of cargo" discharge system was not primarily based upon priority of ships, but was based upon priority of cargo. It was a shifting, flexible designation of those types of cargo that were most needed by appellee (or its consignee or agent) from time to time for the supply of its personnel. In this regard appellee stands on no different footing than the ordinary commercial charterer who, having ordered too many ships into the harbor for discharge, unloads those containing cargo immediately saleable notwithstanding the fact that other ships carrying cargos not immediately saleable had arrived in port first. It seems obvious that appellee (or its consignee or agent) acted as a contractor

in selecting which ships were to be discharged first, rather than as a sovereign, since the system affected only ships under contract to the MSTS, and was based upon appellee's own needs for certain cargo rather than any public and general criteria. Here the MSTS agreed to discharge the vessel, and delegated its duties so to do to the Army personnel at Kure. Under the circumstances the Army personnel acted as the consignees or agents of the MSTS, and appellee is liable for all acts or omissions of the MSTS or its consignees or agents performed in a non-sovereign capacity. *Lind v. U.S.*, 44 Ct. Clms. 558 (1909); *Donnell v. Amoskeag Mfg. Co.*, 118 Fed. 10 (C.A. 1 1902).

5. *In any event, appellee could have avoided the delay by the exercise of ordinary diligence.*

There is no evidence whatsoever that the MSTS made any application or request to the Army personnel at Kure or any other proper effort to discharge the Vessel, although, according to the testimony of Colonel Sanderson quoted above, it is apparent that the Vessel would have been granted immediate discharge had such a request been made by the MSTS. On the other hand, the testimony of Captain Craig is clear that the MSTS made no effort whatsoever even to contact the Vessel until after discharge had commenced. He testified as follows (Tr. 215-216):

> "Q. Captain, in case I haven't made it clear now, the Army had its own discharge facilities and harbor facilities there at Kure, is that correct?
>
> A. Yes.
>
> Q. Was there an MSTS representative there?
>
> A. Not stationed at Kure, no.

Q. Did any MSTS representative contact you at Kure?

A. *Not until late in January when I got word to start discharge,* and *then* the representative came down from Kobe." (Italics added)

It is clear that neither the Kobe MSTS representative nor the Army had any knowledge that the original 120-day charter period had expired on December 2, 1950, before the Vessel arrived at Kure. During the months of December, 1950, and January, 1951, there were at least 12 other ships in the harbor at Kure, all of which were under time charter to the MSTS, and all except one of which were owned by the United States Maritime Administration. Each and every one of those ships were chartered for the same initial period as was the Vessel. All except one of those ships were delivered to the MSTS *after* the delivery of the Vessel, so that their initial term under their respective charters expired subsequent to that of the Vessel. Each and every one of the charter parties applicable to those 12 other ships contained an option for a 120-day extension in favor of appellee, an option which had been deleted from the charter party applicable to the Vessel.

Under these circumstances it is obvious that the Army and MSTS representatives erroneously assumed that there was no need to expedite the discharge of the Vessel because the charter term would simply be extended for an additional 120 days along with the charter term of all the other ships. This is confirmed by the fact that Captain Craig was advised by an United States ammunition inspector, just prior to the commencement of discharge, that "he had received orders

from the Logistics Command in Yokohama to get the ship discharged as quickly as possible and get her back to Seattle as the charter had expired." Certainly this was not the exercise of due diligence, where the charterer made no effort to have the Vessel discharged and, in fact, did not even contact the Vessel itself, until advice was received from a different source that the charter had expired. That the Vessel was then immediately discharged merely confirms the fact that the Vessel would have been given immediate discharge at any prior time by the Army personnel at Kure had a special request therefore been made by the MSTS.

Appellant urges that the delay in awaiting discharge at Kure for 29 days, 22 hours and 20 minutes was not caused and is not excused by restraint of princes, and the findings and conclusions of the court below to the contrary are clearly erroneous.

F. This Action Is Not Barred by Failure of Appellant to Demand a Revision of the Charter Rate of Hire Under Article 29 of the Charter Party, for the Following Reasons:

1. *Article 29 applies only to a revision of the rate of hire during the rightful term of the charter, and not to a claim for damages for wrongful delay in redelivery of the Vessel.*

Brief reference to Article 29(a) in its entirety (Tr. 102-109) makes it apparent that it was intended only to provide for an adjustment in the rate of charter hire during the agreed charter term caused by such factors as increased operating costs (other than wages, which are provided for in Article 29(b)), and not to a claim for damages for wrongful delay in redelivery of the

Vessel. Article 29(a)(2) provides in part as follows (Tr. 102):

> "At any time subject to the limitations specified in this Article, either the charterer or the contractor may deliver to the other a written demand that the parties negotiate to revise the rate of hire *under this Charter Party.*" (Italics added)

This Article must be examined in light of the fact that the charter party form originally contained an option for a 120-day extension in favor of appellee (Tr. 98-99). Article 29 is geared to the basic idea that appellee could and undoubtedly would extend the charter period from time to time, in which event signficant changes in the operating costs might require a revision of charter hire. However, the 120-day extension option was crossed out and eliminated from this particular charter party when the same was executed.

The theory of appellant's action is that appellee breached the charter party by wrongful delay in redelivering the Vessel, for which delay appellant is entitled to such damages as the law allows. It is the law that provides the measure of damages, since none is specified in the charter. The measure of damages is the difference between the market rate of charter hire and the charter rate of hire during that portion of the overlap period caused by wrongful delay. *Munson SS Line v. Elswick Steam Shipping Co.,* 207 Fed. 984 (DCNY 1913), affirmed per curiam, 214 Fed. 84 (C.A. 2 1914). In legal theory appellant does not request an increase in the rate of charter hire, but rather seeks damages for breach of contract, which damages the law measures by comparing the charter rate of hire with the market rate of

charter hire during the period involved. Under no circumstances could this conceivably be deemed a request for an increase in the rate of charter hire subject to the provisions of Article 29 of the charter party.

2. ***In any event appellant made a sufficient demand for negotiation under Article 29 upon the contracting officer on January 19, 1951.***

The letter written to the contracting officer on January 19, 1951 (Ex. 6, Tr. 119-120), was sufficient compliance with Article 29(a) in any event. The only formal requirements of the "demand" stated in Article 29(a) are that it demand negotiation to revise the rate of hire, specify the effective date of the revision, and state briefly the grounds therefor. In this case the letter demanded an increase effective after the initial 120-day charter period, on the ground that the market rate of hire had advanced, and clearly demanded negotiations since it specified agreement as to amount at a later date.

There is no evidence in the record as to whether or not the data requested in Article 29(a)(3) accompanied the letter, since appellee did not assert this as a defense (Paragraph XIV of amended answer, Tr. 50). In any event, no penalty was attached to such a failure, since under Article 29(a)(5) the matter would become a dispute under Article 32 30 days after the data is *required* to be filed, whether or not it is filed.

3. ***By its terms Article 29 is merely a variety of arbitration clause, the benefits of which were waived by appellee by denying liability under the contract.***

Article 29(a) is simply a variety of arbitration clause. The parties agreed that upon the request of

either party they would negotiate for an adjustment in the charter hire, and that failing agreement the matter becomes a dispute under the disputes clause. Throughout the negotiations preceding this lawsuit, appellee has consistently denied any liability under the contract for the delayed redelivery of the Vessel. The contracting officer rejected appellant's voucher submitted to obtain payment of the difference between the market rate and charter rate of hire during the overlap period (Ex. 7, Tr. 121). The contracting officer later denied that he had any authority to consider appellant's claim (Ex. 8, Tr. 122-123). The Navy Accounts Office and the Comptroller General denied that appellee was liable to appellant for breach of contract or otherwise (Ex. 10, 12; Tr. 126, 130). Under these circumstances the arbitration clause is no defense under the doctrine of *E. I. duPont de Nemours & Co. v. Lyles and Lang Construction Co.,* 219 F.(2d) 328 (C.A. 4 1955). In that case a subcontract contained a limited disputes clause. The court held that failure to resort to the disputes clause was not a defense to the action, stating in part as follows:

> "Defendant has never asked that any dispute of fact be referred under this section of the contract, but has merely pleaded the same in bar of plaintiff's right to recover in an answer in which all liability under the contract is denied . . .
>
> " * * *
>
> "Even if it be considered that there are some disputes of fact in the case covered by the Disputes Clause, we think it clear that defendant has waived the right to rely on it. Not only has it not been invoked for the settlement of any disputes either before or after the institution of the litigation, but it

appears also that in the course of negotiations as to the amounts due on account of termination the representative of defendant told the representative of plaintiff 'that if Lyles and Lang did not feel they could settle within the bounds set forth, that they would have to resort to legal action'; . . .

" * * *

"The Disputes Clause is, of course, a limited agreement to arbitrate; and it is quite generally held that the right to rely upon an arbitration agreement contained in a contract is waived by denial of liability under the contract. *The Atlanten,* 252 U.S. 313; *Jones v. Fox Film Corp.,* 68 F.(2d) 116, 117; *Home Insurance Co. v. Scott,* 46 F.(2d) 10, 13, reversed on other grounds 284 U.S. 177; *Mitsubishi Shoje Kaisha v. Nicolau,* 38 F. Supp. 156, 157; *Wallace v. German American Insurance Co.,* 41 Fed. 742; . . ."

Since Article 29 is not applicable to a claim for damages for delay, and since a demand in compliance therewith was made in fact, and since the conduct of appellee constitutes a waiver of any rights thereunder, the findings, conclusions and decree of the court below are clearly erroneous insofar as they are based upon that Article.

G. Appellant's Damages Should Be Fixed at the Rate of $666.67 per Day for 41 Days, 15 Hours and 35 Minutes Wrongful Delay, for a Total of $27,766.35.

This is an admiralty appeal in which this court has the power finally to dispose of the case by entering a decree awarding appellant its damages. *Menefee v. W. R. Chamberlin Co.,* 183 F.(2d) 720 (CA 9 1950).

The measure of damages for wrongful delay is the

difference between the charter rate of hire and the market rate of charter hire during the period by which the overlap was extended by the delay. *Munson S.S. Line v. Elswick Steam Shipping Co.*, 207 Fed. 984, 987 (DC NY 1913), affirmed per curiam 214 Fed. 84 (C.A. 2 1914); *Edward Munch,* 1927 A.M.C. 272 (C.A. 2); *Dampskibs Aktieselskabet Thor v. Tropical Fruit Co.,* 281 Fed. 740 (C.A. 2 1922).

The total delay complained of on this appeal amounts to 41 days, 15 hours and 35 minutes. Counting backwards from the actual date of redelivery, February 12, 1951, at midnight, it appears that the Vessel should have been redelivered on January 2, 1951.

Mr. Comyn, a well-qualified expert witness who has been in the charter business for many years, testified as follows regarding the market rate of charter hire (Tr. 159-160):

> "Q. (By Mr. Knudsen): At what rate could the vessel have been chartered, time chartered, under terms and conditions substantially equivalent to MST 197 had she been available for delivery to the charterer in the latter part of December, '50, or January, '51?"
>
> A. The time charter rate would have been somewhere between $4.75 on the dead-weight and $5.00 on the dead-weight."

He further testified that the rate was $5.00 per ton by January 10th; $5.50 per ton by January 31st; and $6.00 per ton by February 12th (Tr. 171-172). Mr. Comyn also testified that employment would have been available for the Vessel had she been redelivered in early January, 1951 (Tr. 159).

The rate per dead-weight ton is converted to a per-diem rate by multiplying the rate by the dead-weight tonnage of the ship, in this case 10,750 dead-weight tons (Tr. 97), and dividing the result by 30 (Tr. 160). $5.00 per dead-weight ton is $1,791.67 per diem.

The charter rate was $1,125.00 per diem (Tr. 98). Therefore the difference between the charter rate and the market rate of hire on January 2, 1951, when the Vessel should have been redelivered and available for re-chartering, was $666.67 per diem. Applying this difference to the total wrongful delay of 41 days, 15 hours and 35 minutes fixes appellant's damages at $27,766.35.

In addition, under the Suits in Admiralty Act appellant is entitled to interest at 4% per annum on the above amount from the date the libel was filed, February 9, 1953, 46 USCA §§ 743, 745, and to its costs in the court below, 46 USCA § 743.

VI.
CONCLUSION

For the foregoing reasons, the final decree of the court below should be reversed, and the decree of this court entered awarding appellant recovery of its damages, interest and costs in the court below from appellee.

Respectfully submitted,

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